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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1578

JEROME J. BERGER,

Petitioner,

against

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

(Appendix contained herein)

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IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

(Appendix contained herein)

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 453 F.2d 991 (1972). Both this opinion and the unreported opinion of the United States District Court for the Southern District of Florida—Miami Division are printed as appendices to the petition for a writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1972. The petition for a writ of certiorari was filed on or about June 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Does the "clearly erroneous" rule of F.R.C.P. 52(a) apply where a Court of Appeals, leaving the District Court's findings of evidentiary fact undisturbed, reverses its ultimate conclusion of mixed fact and law?

II

Does an appellee who fails to cross appeal from a judgment dismissing with prejudice a separate claim, alternative to the one on which he has received judgment, have a right to remand of the unappealed claim for preparation of Rule 52 findings and conclusions by the trial court where in addition to the failure to appeal it is clear upon the record before the Court of Appeals that the dismissed and unappealed claim is without merit?

Statement of the Case

Petitioner Berger sued respondent CBS for misappropriation of an idea or format for a television program. Berger's complaint was stated in two separate counts. It was stipulated that the case would be determined under the substantive law of the State of New York (P. App. 15).

Count I of the complaint alleged that Berger divulged his idea for a televised fashion show and "model of the year" contest among the participating fashion models to CBS and that CBS thereafter used the format but failed to compensate Berger. Berger claimed recovery in Count I for the reasonable value of his program format on a theory of implied-in-fact contract.

In Count II Berger alleged that CBS breached an express written contract between himself and CBS' wholly-owned subsidiary, CBS Films, Inc. Under this contract

CBS Films, Inc. was to distribute for sale on a "spot market" (non-network) basis a film produced by Berger of a live fashion show entitled "International Fashion Festival". The crux of Count II was the allegation that CBS Films, Inc. was the "business conduit" or "alter ego" of its parent, and that therefore the parent CBS was chargeable with breach of the covenant of good faith and fair dealing implied in its subsidiary's distribution contract with Berger. The alleged breach in Count II was CBS' subsequent contract with one Stewart Cowley providing for the yearly network telecast of Cowley's program "The Model of the Year Pageant" containing elements alleged to be so similar to Berger's International Fashion Festival as to render the latter unsaleable under the CBS Films distribution contract and thus valueless.

The District Court, sitting without a jury, granted Respondent CBS' post-trial motion to dismiss Count I of the complaint and dismissed the said Count I with prejudice to renewal in its judgment (R. App. 1). On Count II the District Court rendered judgment for Petitioner Berger in the sum of $222,750.00 plus $36,007.28 interest.

CBS appealed from the latter part of the judgment (R. App. 2) and the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court. 453 F.2d 991 (1972). Berger did not cross appeal from the District Court's dismissal with prejudice of Count I. Thereafter, Berger petitioned the Court of Appeals for a rehearing, asserting that the Court of Appeals should have remanded Count I to the District Court for findings of fact and conclusions of law with respect to its claim for breach of implied contract. Rehearing was denied, and a mandate issued directing the District Court to enter judgment for Respondent CBS dismissing both counts of the complaint (P. App. 26).

ARGUMENT

POINT I

There is no error with respect to the application of the "clearly erroneous" rule of F.R.C.P. 52(a).

What petitioner calls a "finding of fact" by the trial court, i.e., that CBS Films was merely an instrumentality of respondent CBS, is quite obviously the trial court's mixed conclusion of law and fact, reached by it upon findings of evidentiary fact which the Fifth Circuit, in reversing, did not dispute (See Court of Appeals opinion, Petitioner's App. 12 at 18).

There can be no question that the "clearly erroneous" rule found in F.R.C.P. 52(a) does not bind an appellate court to follow the ultimate factual or legal conclusions of a trial court, *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394-396 (1948), and no question that this was fully understood by the Fifth Circuit. See, e.g., *United States* v. *Richberg*, 398 F.2d 523, 530 (1968) (Goldberg, J.); *Bullock* v. *Tamiami Trail Tours, Inc.*, 266 F.2d 326, 330 (1959).

The New York law as to disregarding separate corporate identity, recognized and applied by the Fifth Circuit (P. App. 16-24) and not challenged by petitioner Berger, is that there must be actual exercise of control over the operation of the subsidiary by the parent at the time and in respect of the transactions complained of. Mere ability to exercise such control is not sufficient. The Fifth Circuit reversed simply on the ground that the trial court's ultimate conclusion of law and fact to the effect that CBS Films had no separate corporate identity could not be sustained by its specific findings.

National Bond Finance Co. v. *General Motors Corp.*, 341 F. 2d 1022 (8th Cir. 1965), is not in any sense in conflict

with the decision of the Fifth Circuit below. In *National Bond* the Eighth Circuit held that the trial court correctly stated the applicable law, made findings of fact supported by substantial evidence in the record and correctly applied the law to such facts, all properly resulting in its determination that the defendant's subsidiary was not its instrumentality. The Eighth Circuit necessarily viewed the trial court's findings in light of the "clearly erroneous" rule since the record did contain conflicting evidence regarding the defendant parent corporation's actual control of its subsidiary. As shown below the Fifth Circuit found that the record at bar contained no evidence in support of the correct rule of substantive law.

Although it appears that the true response to petitioner, as stated above, is that the "clearly erroneous" rule doesn't apply to ultimate conclusions of law and fact of the sort made by the Fifth Circuit below, an alternate response would be that the rule was inapplicable because the relevant evidence on the question of corporate identity did not involve evaluation of the candor and creditability of witnesses. *United States* v. *United States Gypsum Co., supra* at 395; *Orvis* v. *Higgins,* 180 F.2d 537, 539 (2nd Cir.) *cert. den.* 340 U. S. 810 (1950). Any doubt that the Fifth Circuit failed to consider the "clearly erroneous" rule and to make a determination that the trial court's finding was "clearly erroneous" is dispelled by the final paragraph of its opinion where it refers to "the total absence of any evidence showing defendant's actual domination of its subsidiary Films during the period in which the plaintiff's contract was executed and allegedly breached . . ." (See Court of Appeals opinion, P. App. 12 at 24).

Also, Rule 19-1(b) of this Court does not provide grounds for the granting of a writ of certiorari where, as here, the only possible conflict of decisions relates to questions of standards of proof and sufficiency of evidence under state law, and where, indeed, such conflict has been shown not to exist at all.

POINT II

The Court of Appeals correctly mandated entry of judgment for respondent on both counts of the complaint.

Petitioner Berger's contention that the mandate of the Court of Appeals deprived him of his "day in court" with respect to his implied in fact contract count is utterly without merit. As reflected by the record on appeal, and not disputed by petitioner, this count was fully tried by both sides. All that remained and was not done, since the trial court rendered judgment for Berger on his alternative count, was the preparation of Rule 52 findings and conclusions.

But the record is nevertheless clear that, after all the evidence was in, petitioner had failed to make out any case for the existence of an implied in fact contract. Respondent CBS accordingly moved to dismiss Count I on the appropriate substantive grounds, and the District Court in effect reserved decision thereon (R. App. 11-14). At the close of all evidence respondent's motion, reiterated on the same substantive grounds, was granted (R. App. 17). This, plus petitioner's failure to preserve his right to attack the trial courts' dismissal with prejudice of his implied in fact contract by effecting a cross appeal has properly resulted in barring petitioner from enjoying yet another "day in court".

Petitioner's first count, asserting his claim for breach of an implied contract, was separately stated and was, in fact, separate from and alternative to his second count for breach of an express contract. As this Court has many times determined, a judgment dismissing a separate claim with prejudice is not subject to appellate court consideration or modification, including remand for further substantive action, unless an appeal has been taken from it. *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250-251 (1937); *See also*,

Morley Co. v. *Maryland Casualty Co.*, 300 U. S. 185, 191-192 (1937); *Le Tulle* v. *Scofield*, 308 U. S. 415 (1940); *Penfield* v. *S.E.C.*, 330 U. S. 585, 594 (1947), reh. den. 331 U. S. 865 (1948). Respondent CBS' appeal brought up for consideration by the Fifth Circuit only the question of the correctness of the trial court's judgment on the express contract count and petitioner Berger's failure to cross appeal from the dismissal with prejudice of his first count in implied contract precluded the Court of Appeals from making any disposition with respect to such count.

In spite of petitioner's failure to cross appeal it is nevertheless apparent that the Court of Appeals reviewed the record regarding the implied in fact contract count and determined that it could not prevail. This review undoubtedly took place following Berger's petition for rehearing, where among other issues, he raised the question of remand of this count. After receipt of the petition for rehearing the Fifth Circuit, ignoring all of its other points, requested respondent CBS to address its reply to that portion of the petition which urged remand of the implied contract count for findings by the trial court. In response to this request the CBS memorandum argued that Berger was barred from a remand by his failure to cross appeal and went on to show exhaustively how the record precluded Berger from any implied contract recovery.

The dispositive issues on the substantive question and the state of the record concerning them are as follows:

1. *Respondent did not use petitioner's idea.* Respondent's "Model of the Year Pageant" was packaged in its entirety and supplied to it by Stewart Cowley. The unimpeached testimony of Sandy Howard and Cowley established that Howard and Cowley had collaborated in the creation of the basic idea of the Model of the Year Pageant in 1962 without knowledge of or access to petitioner's concept (R. App. 3-6, 14-16). Such uncontradicted proof of the independent creation was itself sufficient to preclude plaintiff's claim for breach of implied contract. *Turntable Products Co.* v. *Radio Corp. of America*, 155 N.Y.S. 2d 73

(Sup. Ct. 1956); *Bailey* v. *Haberle Congress Brewing Co.*, 193 Misc. 723, 85 N.Y.S. 2d 51 (Mun. Ct. 1948); *Pinci* v. *Twentieth Century Fox Film Corp.*, 95 F. Supp. 884 (S.D.N.Y. 1951).

2. *Petitioner's idea lacked objective originality.* Respondent CBS proved below that petitioner's idea was a commonplace in the television broadcast industry with uncontradicted documentary evidence, consisting of a format for a fashion show actually televised over the CBS TV network in 1951 in which a "Cover Girl of the Year" was selected; this was petitioner Berger's format, but ten years earlier in time (R. App. 16). CBS also proved that six other formats containing the same premise were submitted to the American Broadcasting Company during the years 1948 to 1961 (R. App. 8-11). In view of the clear New York law requiring "novelty", this evidence also required the dismissal of Count I on the merits. *Bristol* v. *The Equitable Life Assurance Soc'y*, 132 N. Y. 264, 30 N.E. 506 (1892); *Grombach* v. *Fred M. Waring*, 293 N. Y. 609 59 N.E. 2d 425 (1944); *Soule* v. *Bon Ami Co.*, 201 App. Div. 794, 195 N.Y.S. 574 (2d Dept. 1922), aff'd 235 N. Y. 609 (1923); *Bram* v. *Dannon Milk Products, Inc.*, 33 A.D. 2d 1010, 307 N.Y.S. 2d 571 (1st Dept. 1970).

3. *Petitioner publicly presented, and therefore forfeited, his program idea.* Petitioner's admission that in 1961 he initially solicited CBS' consideration of his fashion show idea by gratuitously divulging it (R. App. 6-7) also separately required dismissal of Count I on the merits. *Grombach* v. *Waring, supra.* Peitioner's public presentation in Las Vegas in 1965 of his International Fashion Festival and subsequent distribution with his authorization of a film of the International Fashion Festival (R. App. 7-8) accomplished the same result. *Herwitz* v. *National Broadcasting Company, Inc.*, 210 F. Supp. 231 (S.D.N.Y. 1962).

As a result of this unambiguous record respecting petitioner Berger's claim for breach of implied contract the Court of Appeals was in a position to reach its own eval-

uation of the record without the aid of Rule 52 findings and conclusions. The Court of Appeals was entitled to do this, *Urbain* v. *Knapp Brothers Manufacturing Co.*, 217 F.2d 810, 816 (6th Cir. 1954), cert. den. 349 U. S. 930 (1955); *Girard Trust* v. *Amsterdam*, 128 F.2d 376 (5th Cir. 1942); *Seligson* v. *Roth*, 402 F.2d 883 (9th Cir. 1968); *Hurwitz* v. *Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943); *Sbicca-Del Mac, Inc.* v. *Millius Shoe Co.*, 145 F.2d 389, 400 (8th Cir. 1944); *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F.2d 1, 3-4 (4th Cir. 1942), and in view of its stated concern with the question of remand and its denial of Berger's petition for rehearing without comment, must be understood to have considered and relied upon both the procedural and substantive arguments advanced against remand of the implied contract count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that three copies of the foregoing Brief for Respondent in Opposition to a Petition for a Writ of Certiorari were furnished on the 5th day of July, 1972 to the following:

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Final Judgment of District Court.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA—MIAMI DIVISION.

Case No. 68-9-Civ-CF

JEROME J. BERGER,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,

Defendant.

This action came on for trial before the Court, the Honorable John V. Singleton, Jr., United States District Judge, presiding, and the issues having been duly tried and the Court having rendered and filed an Opinion and having made therein Findings of Fact and Conclusions of Law on December 21, 1970, it is, therefore,

ORDERED and ADJUDGED, that the Plaintiff, Jerome J. Berger, recover of the Defendant, Columbia Broadcasting System, Inc., the sum of $222,750.00, plus $36,007.28 in interest, and his costs of this action on Count II of the Complaint, and it is further

ORDERED and ADJUDGED, that Count I of the Complaint be, and the same hereby is dismissed, with prejudice to renewal.

DONE and ORDERED, in Chambers, at Houston, Texas, this 20th day of January, 1971.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

App. 2

Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 68-9-Civ-CF

JEROME J. BERGER,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a New York corporation,

Defendant.

Notice is hereby given that Columbia Broadcasting System, Inc., a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 26th day of January, 1971.

Dated at Miami, Florida, this 19th day of February, 1971.

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By WILLIAM B. KILLIAN
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Excerpts From Appendix of Record of Trial Proceedings

VOLUME 1—APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1562

[TITLE OMITTED]

Appeal from the United States District Court
for the Southern District of Florida

SANDY HOWARD

[222] In 1962. It was either October or November. I don't remember the exact date.

• • •

I went to Stew with the idea of presenting a television special about the model of the year. We talked at my home at 25 Central Park West.

[223] I said in the fall of 1962. We discussed the program from all aspects at that time. We discussed it subsequently, but I did not go ahead with the show because I went back to Europe or I went to Europe to make motion pictures because I needed the money at that time.

• • •

Well, I can recall the conversation rather vividly because I had discussed this before I discussed it with Stew. I discussed it with others and others had discussed the idea with me.

[224] Basically, what I felt is that it would be a very good commercial concept to present what I would call the model of the year, to be able to bring to television those

people who are involved in the modeling business, those people who could present the clothing, the jewelry.

It was a very commercial idea, to present this on television in a pageant form, similar to Miss America, Miss USA, the outstanding model of the year and in bringing out the background of each of these young girls who would represent every segment of American society, because every young lady in America somehow thinks of herself as being a model.

I thought it would be very vicarious and it would have great magazine potential and newspaper potential and I felt it would be a very commercial television program that many sponsors would go for, whether it would be Revlon or others, and they would want to be involved with it.

I felt it could be more successful than most pageants because of the commercial aspects in presenting all of this cross-section of young women in a commercial sense.

• • •

[225] I had a series of conversations with Stew.

When I say conversations, I talked with Stew on the phone several times. We met in a place that we both frequented in New York, P.J. Clark, a restaurant on 55th Street and Third Avenue, at which time I asked Stew, I guess, from the time we met in '62 through probably '63, '64, '65, whether he was going ahead with it, and he told me at the time when I would be back from Europe or wherever I was making films, that he was deeply involved in trying to present this pageant that he felt he would go ahead, and I said, "Well, I promise you I won't feel that of all my particular idea that I submitted might be contagious," because I knew that it was in my mind a public domain idea and it was an idea that was so obvious that everybody had discussed it so many times and I didn't feel I had any priority on it and I never pretended to get any piece of the action.

• • •

Excerpts from Appendix of Record of Trial Proceedings.

[227] Therefore, my mind was very clear on the [228] subject and I remembered very specifically because it was such an obvious situation, and I didn't again claim any great priority on the idea. It was my opinion that if we were to take the young people around the country and have a series of contests that would bring the winners, similar to Miss America, to New York for this elimination and to have them compete as professionals against the professionals in the New York area, which was at that time basically the modeling center of the world, if we were to tell the backers of these youngsters and if we were to tie in the hairdressers, the clothing people, the fur people, the makeup people—I'm talking of Revlon and the very obvious sponsors—if we were to make it a Miss America of modeling and decide not to call it Miss America but to call it Model of the Year, it may be a dull program but it sure as hell could make a lot of money, and that really was what I was after at the time. I was completing the latest of my comebacks.

• • •

[229] I would say that Stew is probably one of the more knowledgeable and experienced people in the modeling business. Stew has certainly been in it longer than anybody I personally know, and his knowledge of the business is so extensive that he is one of the few people who survived in what is a very precarious business. He just knows the racket.

Stew does have the reputation of working extremely hard. He is one of those 18 hours a day, seven days a week men, and I felt that he was the kind of a person who could make up for what I did not know. I'm a producer of commercial television programs at this time [230] and of commercial motion pictures. I am not a modeling expert.

I felt that bringing Stew into the picture would cover me for my own deficiencies, and I felt he was probably the

best person I knew in the business, and I think others would feel the same. He is considered one of the top pros in that business.

• • •

This is probably not the right terminology, but in my business as a producer you think of the words public domain, an idea that we do not own. I had no concept at that time, nor do I now, that my position with a model of the year or models of the year was a new concept. It just wasn't. It had been discussed [231] too many times, and I thought yes, there may be variations on it, but I don't think any variations would be unique on this or that I could claim any kind of copyright ownership, and I said to him, "Please, be my guest. This is not a new idea, not a new concept."

He had told me, incidentally, at the time that we met and I asked Stew to come to my apartment in New York—he made it very clear in front that he had a concept of a model of the year show for a long time, and I said, "Well, I can't be terribly surprised. This is your bag, this is your racket."

So it was something that when he came up to see me, he was seeing me as a professional producer on a concept he already had, and he made it very clear to me in front to protect his own interest that it was not something that Sandy Howard had come up with, an idea about a modeling show which he obviously had had for a long time.

JEROME J. BERGER

[255] Q. Did you have any conversations with Mr. Levitan during the production of that show about the future? A. Yes, I did.

Q. What types of conversations did you have with him, sir? A. I had one conversation in particular with Paul Levitan. It was during a break, as I remember, a break

in rehearsal. I came over and sat down with Paul. I think we were having coffee or we were sitting in the empty auditorium during a break.

I said, "Paul, I have been interested in getting into the field of television and getting away from these theatricals and trade shows. I have an interesting concept of a show and I would like your advice as to how I can get it with CBS," because my first and only actual association with network television was with Paul.

I outlined to him the basis of what I had conceived as the International Fashion Festival, and to the best of my recollection it embodied, number one, the use of high fashion in conjunction with a contest in- [256] volving models.

Another facet of the show was the use of designers, so that when I would use the words "model of the year," I could also use the words "designer of the year."

I further said that I thought entertainment would have to be an integral part of the show, and that was what I outlined to Paul.

Paul said, "Jerry, we've got a job to do here. When we finish here, you come up to New York and I'll be happy to sit down and talk to you about it and help you get it on CBS."

The Court: What year was this?

The Witness: 1961. It would be in July, Your Honor.

* * *

[329] Q. Mr. Berger, we were discussing the 1965 International Fashion Festival and the wild footage that was converted into a movie in connection with it.

How did that movie sell? A. Not well at all, Mr. Black.

Q. Do you know where it sold? A. The only reports I got back were that it was sold in Los Angeles, it was sold in Las Vegas. I know I got one copy print from Ohio,

which they never indicated it was—CBS never indicated it was shown there, but it came from a station in Ohio. I needed it for a showing here in Miami on Channel 10.

• • •

VOLUME 2—APPENDIX

KAY MURPHY

[654] Q. Have you ever heard the name Jerome J. Berger? A. Yes, I have.

Q. In what connection did you hear the name? A. He submitted a proposal to ABC.

[655] Q. Was it a solicited proposal or unsolicited? A. Unsolicited in our concept of the word. I don't, you know—

• • •

Q. Did you bring with you the synopsis that you maintained in the records of ABC pertaining to an unsolicited submission from Jerome J. Berger? A. One of them, I did.

Q. Was there more than one? A. Yes. There were two.

Q. Which one did you bring? A. I believe the one submitted in 1964. I did, possibly '64.

• • •

[656] This is a two-page memo about a program proposal that Mr. Berger had brought to ABC entitled International Fashion Festival.

Mr. Girden: I would like to offer this into evidence as Defendant's Exhibit No. 8.

[657] The Court: It will be received in evidence.

• • •

[658] Q. [By Mr. Girden] Could you read the last paragraph on the third page, please. A. This is the memo here?

Excerpts from Appendix of Record of Trial Proceedings.

Q. Yes. A. Excuse me.

"Mr. Berger has approached both CBS and NBC with this idea and says that interest was evinced. Because of his desire to use Edith Head he says he would prefer to do the show on ABC and will not deal with anyone else until his return from Europe in a month."

Q. Miss Murphy, did I ask you to go through your files at ABC to try to find any either submissions or broadcast programs prior to the year 1967 which com- [659] bined the elements of fashion show and beauty contest? A. Yes, you did.

Q. Have you found any such programs? A. Yes.

Q. Could you please show us which ones you have been able to locate?

The Court: Submissions?
The Witness: Yes.

Q. [By Mr. Girden] You may proceed. A. A submission to ABC— I don't know how much detail you want.

This was a half-hour serial built on quoting—built on the idea of introducing America's cover girls, having them display their obvious and hidden talents, relating their unusual human interest stories.

Q. When was that submitted? A. Well, it was received at ABC on June 12 of 1961.

Q. Were there any others? [660] A. This is something called Let's See The Girls, submitted in 1949. This combines the appeals of a fashion show, talent-hunt, beauty contest and comedy show. All girls are eligible to audition for the show whether they come from model agencies, talent agencies the legitimate theatre or the general public. The loveliest and most talented of the girls are chosen to appear on the show. They are costumed in the most fashionable gowns, furs and accessories. They then ap-

pear on the show demonstrating their beauty and talent. The viewing audience picks the winner.

Q. What is the next one, Miss Murphy? A. A program proposal entitled Appointment with Glamour, submitted in November of 1954 and received at ABC [661] in November of '54.

It would be a program in which girls who believe they have photogenic qualities and modelling ability would be given an opportunity to win a modelling assignment.

Girls would submit snapshots and then be assembled as contestants. This would be a premiere showing of Dior collections and the girls would take on specific modelling assignments.

[662] Q. Go to the next one. A. A submission entitled Meet Your Cover Girl received at ABC in August of 1958.

The Court: I thought we had that.

Mr. Girden: This is an earlier submission, Your Honor.

The Court: When was this?

Mr. Girden: She has read from a similar one on The Cover Girl.

Q. [By Mr. Girden] Go ahead. A. A program entitled Get Up and Go received at ABC in September of 1953.

It presented a fashion show feature with a panel of famous fashion designers, stylists and columnists, a commentator and models of all sizes. It would be a contest between those to choose the Fashionplate Girl of the Week.

[663] Q. Miss Murphy, do any of your records indicate prior broadcasts, actual broadcasts of programs combining the two elements we are talking about?

* * *

[664] The Witness: I don't have actual broadcasts, but this is, for instance, a clipping from Va-

riety dated September 20, 1961. It's a review of a show called Fashion Spectacular broadcast on WFIL-TV in Philadelphia. It's a thirty-minute spectacular of fashions from abroad presented and modelled.

* * *

[666] Mr. Girden: According to the way I have them marked here, we then have in evidence Defendant's Exhibits 11, 13, 14, 10 and 8, as well as 9?

Motion to Dismiss First Cause of Action and Ruling Thereon.

[984] Mr. Girden: Now I want to make a motion to dismiss the first cause of action.

* * *

[985] The plaintiff's burden under the first cause of action is to prove that the defendant wrongfully appropriated property, in violation of an implied in fact contract.

* * *

An implied agreement to compensate him.

I think we have stipulated this is to be determined under the laws of the State of New York. There is no tortious recovery for this type of cause of action in New York. It would have to be under an implied—

* * *

It is characterized by implied in fact or implied in law quasi contract.

* * *

[988] The basis of my motion is the plaintiff has the burden to prove an appropriation on his case. Under the laws of the State of New York, the plaintiffs must show to the n'th degree, in an appropriation or quasi-contract or an implied in fact theory that he had the property, that it was protectable and that if it was protectable he did

protect it and that if he did protect it the defendant wrongfully used it and that if the defendant wrongfully used it, the defendant has been unjustly enriched by it.

• • •

[989] We are saying the plaintiff to have property must have proven in his case that he had a unique, novel and original idea, adequately reduced to concrete form prior to any unsolicited disclosure; that there wasn't any unsolicited disclosure which would cause a forfeiture or dedication; that there has been no subsequent forfeiture or dedication of any idea allegedly used by defendant putting it in the public domain.

We contend that there is no evidence in this case that the plaintiff had anything reduced to concrete form prior to June of 1966, when he submitted a script to both Foote, Cone & Belding and to Mr. Campus at CBS.

There is not a scrap of writing that predates about June 1, 1966. The only other evidence of concrete form was the film, which was shown to Your Honor, of the International Fashion Festival, on or about April 1, 1965.

The only thing in that film which has any relation to this case—there is no contest, there is no judging, there is no nothing, except an award at the end of a plaque to a model of the year, which wasn't even filmed at Las Vegas because it was dubbed in with a black and white photograph, which was edited here in New York.

• • •

[990] Now, Your Honor, even if CBS saw this film, if Mr. Levitan saw the film or saw the presentation and saw the element of an award being given to a model of the year and took that and built a program himself around that, that would not give plaintiff a cause of action, because in the first place, the idea is only a bare, basic idea, not reduced to concrete form; secondly, when it was disclosed to Mr. Levitan, by plaintiff's own testimony, unsolicited, it was forfeited and dedicated to the public;

thirdly, when it was broadcast over the air, Herwitz versus NBC, in the Federal Court of New York, the basic idea, which is unprotectable, was forfeited and dedicated to the public.

Under the plaintiff's own testimony, when he made unsolicited submissions to Foote, Cone & Belding, ABC and NBC, the plaintiff forfeited and dedicated any rights he may have had in and to the idea.

• • •

[995] We are claiming the first unsolicited disclosure from plaintiff to Mr. Levitan back in 1961, constituted the forfeiture or dedication. There is nothing in confidence in that disclosure. He went to Levitan to find out how can he get this on television. Mr. Levitan gave him advice, by Mr. Berger's own testimony.

The other point I wanted to raise is that plaintiff has this problem: The problem is either what he claims to have been his property did not achieve the dignity of property because it was not novel, original, unique or sufficiently reduced to concrete form, and thereby flows into the common domain, and if he did in some form or fashion, I don't see how, reduce it to concrete form, with enough protectability and protection, he did not protect it under the Sears and Comco cases, and upon any disclosure it is forfeited, dedicated, Your Honor, in the Sears and Comco cases, and delineated in the field of literary property by one of Mr. Black's favorite cases, and I tried the case in the Federal Court in Rhode Island, and it was reversed by the First Circuit.

[996] Secondly, plaintiff is trying to proceed on some sort of a theory that it is the title, the Model of the Year, which has been stolen here. This would be the contest of selecting a model of the year.

Well, Your Honor, there is no cause of action pleaded for a title claim or for unfair competition and there

couldn't be because there is no proof of any secondary significance redounding to the title, Model of the Year.

• • •

That is the basis of my motion Your Honor.

• • •

The Court: No I am going to overrule his motion.

[997] In the first place, I would overrule your motions.

Mr. Girden: Are you denying it or reserving decision, Your Honor?

The Court: On your motion, I am just going to overrule it at this time.

• • •

VOLUME 3—APPENDIX

STEWART COWLEY

[1202] Well, other than my brother and sister-in- [1203] law and mother in the early days, the first discussion I had with an outsider was with a man called Oleg Cassini. We used to play golf a lot.

In 1961, when I started my new company, we were very seriously discussing forming a partnership for my new company and he was going to be one of the major elements of it. At that time we had discussed this pageant as a gimmick, a search for models, a beauty pageant for models as a part of a piece of the company that we would be forming. It would be a separate operation, but it would be an interesting way to discover the talent and maybe make some money.

• • •

There was another party involved, who had a stock right at that time, and he became incapacitated and the whole thing died.

At that time Oleg was a great traveller. He would travel with his clothes and he would do these fashion shows

all over the country, more so than most designers, I would say. Every city he would go to he would have the girls there and he would be scouting girls ahead of him to have girls available among the local [1204] girls to show the clothes when he would put these little shows on for the local people.

It seemed like every city he went to he would come up with a beautiful girl of some kind and he seemed like a pretty good fellow to have to be involved with. Besides, the third party was to him and the third party was very important to this project. The third party was going to put the money in.

* * *

[1205] Well, as I recall, we had been in business less than a year. We had been making a big impression on the industry when we opened our new companies. We had a good flying start when we opened up.

Sandy called me up. He was at that time a producer of motion pictures or television films and projects. He called me and thought we should have a talk about a plan he had or a thought he had about a documentary or a special on the modelling business and he invited me over to his home to discuss it.

Naturally, I went, because in our business publicity is important and we like to be known throughout the country.

* * *

Well, we discussed the special of modelling and I naturally thought that was a good idea if we were [1206] included in it, which he had planned to do. At that time I thought that if he could do something like this about the modelling industry, this might be an opening for us to get our pageant launched and so I divulged to him what I had been planning and thinking about.

* * *

I told him I had been planning and hoping to do a beauty pageant featuring models where the prize would be a career for the lucky girl and maybe even the losers, but it would be a pageant that dealt with that cool, slim, elegant look that we look for in our business, and it would sort of be a way to bring New York to the boondocks, go out there and bring ourselves to the girls out there in the little towns around the country, instead of waiting for the girls to come to us in New York, many of whom just never do because they don't have the nerve or the ambition or maybe they are just plain scared. I don't know what it is, but a lot of talent out there just never gets to New York.

• • •

Well, Sandy and I talked about it several times. We had several meetings. He was interested. He [1207] thought it was a great idea, and we were going to do it together.

We discussed this matter over a period of two or three years. The problem was he was always having to run off to Europe or somewhere on other projects and we would be interrupted each time. It finally just died.

• • •

Evidence of Non-Originality

[1291] Mr. Girden: I would like this marked as a collective exhibit for the defendants.

[The document referred to was marked as Defendant's Exhibit No. 23 for Identification.]

Mr. Girden: This is a program that was broadcast by CBS in 1950 and 1951, which is a selection of a cover girl of the year by the very defendant • • •

• • •

[1293] The Court: Defendant's Exhibit No. 23 will be admitted into evidence.

• • •

Excerpts from Appendix of Record of Trial Proceedings.

JEROME J. BERGER (Cont'd)

[1324] Q. [By Mr. Girden] Mr. Berger, did you ever submit your program concept to the American Broadcasting System? A. I am certain Mr. Hartman did. I don't recall whether a submission was made by me, but Mr. Hartman, who was my agent, did make a submission.

[1325] Q. Did you ever make a submission to the National Broadcasting Company, Inc.? A. Yes, I did.

Renewal of Motions.

Mr. Girden: Your Honor, at this time I would like to renew my motions to dismiss the first and second counts on the same grounds as stated before, and as to the first count upon the additional ground of the independent creation of the Model of the Year pageant by Mr. Cowley and his organization.

The Court: Well, I will hear you all in the morning briefly on what you conceive that you have and have not proven or what you conceive to be the law.

* * *

[1677] Mr. Girden: At this time I would like to renew my motion to dismiss the first cause of action. You have made a ruling on the second cause of action. The first cause of action is the implied contract and the implied law in a quasi contract.

The Court: I think I will have to grant that motion.

* * *

[1688] Mr. Girden: Is the dismissal you granted as to the first count with prejudice?

The Court: With prejudice; yes, sir.

* * *